

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 19950 of 2005****For Approval and Signature:****HONOURABLE MR.JUSTICE D.A.MEHTA****HONOURABLE MS.JUSTICE H.N.DEVANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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VADILAL INDUSTRIES LTD. & 1 - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)

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Appearance :

MR PARESH M DAVE for Petitioner(s) : 1 - 2.
MR JITENDRA MALKAN for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 02/12/2005**ORAL JUDGMENT**

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.This petition primarily challenges the action of the Registry of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT)/Tribunal), whereby the papers of Rectification of Mistake Application filed by the petitioner-company were returned under cover of letter dated 23-8-2005 (Annexure J to the petition). It is further prayed that CESTAT be directed to hear and decide the ROM Application on merits. Though, the petitioner has made various other prayers seeking quashing and setting aside of the order made by CESTAT in appeal as well as the orders of the Commissioner (Appeals) and the Adjudicating Authority, it is not necessary to enter into the controversy on merits in light of the view that the Court is inclined to adopt.

2.Heard Mr. Paresh.M. Dave, learned advocate for the petitioners. Rule. Mr. Malkan waives

service of notice of rule on behalf of the respondents. The matter is taken up for final hearing and disposal today in light of the fact that the controversy lies in a very narrow compass.

3. The bare facts necessary for appreciating the controversy are such that the petitioner had taken over a partnership firm namely, M/s Gujarat Cup Company from January, 2003. The said firm was manufacturing paper cups for ice-cream and during April, 1994 to June 1997 the partnership firm availed of concessional rate of duty under notification no.20/94, dated 1-3-1994. The respondent-authority issued show cause notice proposing to deny the concessional rate of duty and ultimately passed an order on 13-1-98 raising a demand of Rs.14,86,656/- with penalty of Rs.50,000/-. The appeal filed by the petitioners before Commissioner (Appeals) failed and hence, the petitioners approached the CESTAT by way of Second Appeal.

4.It appears that on 16-10-2003 when the Second Appeal was fixed before the Bench of CESTAT at New Delhi, the advocate of the petitioners applied for adjournment as he was preoccupied with some other work. The application for adjournment was turned down and the appeal came to be decided ex-parte. It is the say of the petitioner that the petitioner was not aware about the order made by the Tribunal on merits, dismissing the appeal partly. It is further averred in the petition that the order made by CESTAT was not served upon the petitioner or its advocate.

5.On 13-7-2005, the petitioner received communication dated 8-7-2005 from respondent No.3. Hence, on 14-7-2005, the representative of the petitioner visited the office of respondent No.3 to ascertain the proceedings for which the hearing was to take place and came to know that the Tribunal had while denying the benefit under the Notification

remanded the case for recalculating the value of the goods manufactured and as a consequence the duty payable. Thereupon on 16-7-2005 the petitioner made an application addressed to the Assistant Registrar, CESTAT for a certified copy of the order in appeal.

6. In the meantime, on 18-7-2005, representative of the petitioner obtained a photo copy of the order dated 16-10-2003 made by the Tribunal, from the office of respondent No.3. Armed with the said copy, the petitioner moved a Rectification of Mistake Application on 5-8-2005. On 23-8-2005, the Technical Officer of CESTAT returned the application by stating "The R.O.M in the above mentioned matter has been filed by you after expiry of limitation period of six months. Hence, the R.O.M is time barred and papers filed by you are returned herewith along with the Demand Draft."

7. Mr. Paresh Dave submitted that approach of CESTAT/Technical Officer of CESTAT was not

borne out from the facts on record. That the petitioner had not received the certified copy from the Tribunal, had made an application for the same being furnished and on the basis of the xerox copy received from the office of respondent No.3 moved ROM application. Therefore, according to Mr. Dave, the period of six months could be computed only from 18-7-2005 at the earliest. And if this date was taken as the starting point of period of limitation, the ROM application was within the period of limitation. He also submitted that provisions of Section 35 C (2) of the Central Excise Act, 1944 (the Act) which used the words 'from the date of the order' had to be construed to mean from the date of receipt of order and for this purpose placed reliance on various authorities, including the decisions rendered by the Apex Court. He also contended that the Technical Officer could not have returned the papers without placing the same

before the Bench of the Tribunal as it was the Tribunal which had the authority to decide the ROM Application.

8. Resisting the case of the petitioner Mr. Malkan on behalf of the respondents, namely respondent Nos.1 and 3, submitted that no fault could be found with CESTAT as it had done everything within its powers to serve the copy of the order of the Tribunal. That, though the petitioner-company shifted manufacturing unit after taking over the partnership firm, from Bayad to Ahmedabad, the petitioner had failed to intimate the change of address on the record of the Tribunal. Therefore, the Registry of the Tribunal had effected service at the address mentioned in the memorandum of appeal as required by CESTAT rules. He therefore, submitted that the petition was required to be rejected on this ground alone.

9. When the petition came up for hearing before this Court on 3-10-2005, after hearing the

advocate for the petitioner, the Court issued notice with a direction to respondent No.2 to place on record the details as to when and how the impugned order of Tribunal dated 16-10-03 was served on the petitioner. The said order was followed by order dated 18-11-2005.

10. In response to the aforesaid order, Deputy Registrar, CESTAT, New Delhi, has forwarded communication dated 19-10-2005 whereunder it is stated that the final order made by CESTAT was dispatched through Registered Post A.D. to the address of the petitioner as indicated in column no.6 of prescribed form of appeal on 9-12-2003, but the same was received back unserved on 13-12-2003.

11. Therefore, the fact that the order remained unserved on the petitioner is not in dispute, though on behalf of the respondents an attempt was made to contend that, in these circumstances, due to lapse on part of the petitioner it had not received the order and

this could not be equated with non-service of the order. According to the learned counsel, it must be taken that the Registry of CESTAT having taken the necessary steps in accordance with the requirement of law to effect service nothing further was required to be done by the said authority, and therefore, the ROM Application had been rightly held to be barred by limitation, and hence there was no scope for any intervention.

12. Under Section 37 C of the Act a provision is made prescribing the mode of service of any decision or order, any summons or notice issued under the Act or the rules made thereunder. Under clause (a) of Section 37 C of the Act it is laid down that the decision, order etc. should be sent by Registered Post with acknowledgement due ; in the case of failure to effect service in the mode prescribed under clause (a), clause (b) stipulates that the same shall be done by

affixing a copy thereof to some conspicuous part of the factory etc ; and lastly, in the event of failure to effect service by the mode prescribed under clause (b), clause (c) provides that the service be effected by affixing a copy thereof on the notice board of the officer or authority who or which made the order etc. Under sub section (2) of Section 37 C of the Act, a statutory presumption is provided wherein it is laid down that the service will be deemed to have been effected if the decision, order etc. is tendered or delivered by post or a copy thereof is affixed in the manner laid down in sub section (1) of Section 37 C of the Act.

13. In the present case, the Registry of the Tribunal has categorically averred that it had sought to effect the service in the manner laid down in section 37 C (1) (a) of the Act and the envelope had been returned unserved. Therefore, the Registered Post had not been acknowledged.

Thereupon, it became necessary for the authority to effect service in the mode prescribed under Section 37 C (1) (b) of the Act, and in the event of non-service by the said manner, by the mode prescribed under clause (c) of sub Section (1) of Section 37 C of the Act. It is not even the case of respondent No.2 that it had sought to effect service and had effected service in any of the modes prescribed under clauses (b) and (c) of sub Section (1) of Section 37 C of the Act. In the circumstances, the averment made on oath by the petitioner that a copy of the order was not served on the petitioner, remains unrebutted.

14. There is one more aspect of the matter. The Technical Officer of CESTAT vide communication dated 23-8-2005 has returned the papers of ROM Application on the ground that the same was barred by limitation. Section 35 C (2) of the Act provides for the period of limitation coupled with the powers of the Tribunal to

rectify any mistake apparent from the record or amend any order passed under Section 35 C (1) of the Act. At the first blush it appears that the period of limitation has to be computed at any time within six months from the date of the order. However, when one reads the latter portion of the provision, it becomes abundantly clear that the period of six months from the date of order is in relation to the power of rectification that the Tribunal may exercise suo motu. The Section is divided into two parts. The first part grants discretion to the Tribunal to take up any order made under sub Section (1) of Section 35 C of the Act for rectifying any mistake apparent from record or amending any order within six months from the date of the order. The second part of the section requires that the Tribunal shall make such amendments if the mistake is brought to its notice by either party to the appeal before it. The party to the appeal can bring the fact

of apparent mistake on record only after going through the order made by the Tribunal. Therefore, to read that the period of limitation has to be computed at any time within six months from the date of the order does not fit in either with legislative intent or the language employed by the provision.

15. There is another angle from which the matter can be approached. It is only the party to the appeal who finds that the order contains a mistake apparent from the record and is aggrieved by such mistake, would be in a position to move an application seeking rectification of the order. Therefore also, unless and until a party to the appeal is in a position to go through and study the order it would not be possible, nor can it be envisaged, that a party can claim to be aggrieved by the mistake apparent from the record. Hence, even on this count the period of limitation has to be read and understood so as

to mean from the date of the receipt of the order.

16. Therefore, the action of the Technical Officer to return the papers of ROM Application without even placing the same before the Bench concerned is not only bad in law, but is not supported by the provisions of the Act.

17. In these circumstances, the ROM Application moved by the petitioner not having been disposed of on merits after hearing the parties, it would be just and fair that the same is taken on record and disposed of after hearing the parties. The communication dated 23-8-2005 (Annexure J), addressed by the Technical Officer of CESTAT to the petitioner is hereby quashed and set aside. In the circumstances, the petitioner is directed to present ROM Application on or before 16th December, 2005, accompanied by a plain copy of this order without waiting for certified copy and the Registry of the Tribunal is directed

to take the same on record and after completing the necessary formalities, circulate the same for hearing before the appropriate Bench as may be directed by the concerned Bench.

18.As the record reveals the appeal was fixed for hearing on 16-10-2003, the petitioner prayed for adjournment through its advocate and thereafter did not take any steps to pursue the outcome of adjournment application, nor did the petitioner make any inquiry as to why no date of hearing was being fixed. This lapse of the petitioner continued up to 13-7-2005 i.e. nearly two years and in the circumstances, it would be just and fair if the petitioner is directed to pay costs of the petition to the respondents namely respondent no.3. The costs so payable by the petitioner are quantified at a sum of Rs.10,000/- (Rupees Ten Thousand Only). The same shall be paid by the petitioner within a period of ten days from today.

19.The petition is accordingly allowed. Rule is made absolute to the aforesaid extent.

(D.A.MEHTA, J.) (H.N.DEVANI, J.)

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